

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY E. HANCOCK and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Huntington, WV

*Docket No. 02-1984; Submitted on the Record;
Issued January 15, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is entitled to a schedule award for his accepted work-related condition of asbestosis.

On August 6, 1999 appellant, then a 70-year-old boiler plate operator, filed an occupational disease claim alleging that on May 1, 1999 he first realized his asbestosis was employment related.¹

By decision dated April 25, 2000, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the basis that the evidence failed to show that appellant had any permanent impairment due to his asbestosis.

Appellant requested reconsideration by letter dated June 6, 2000 and submitted evidence in support of his request, including a May 15 and 16, 2000 x-ray interpretation by Dr. Ray A. Harron, a physician Board-certified in radiology and nuclear medicine.

In a July 21, 2000 report, Dr. Balusamy Subbiah, a second opinion Board-certified internist, concluded that appellant had "mild pulmonary fibrosis bilaterally" and "pleural thickening which we are not sure whether it is due to asbestosis-related thickening or due to thoracotomy." Dr. Subbiah reported that the pulmonary function tests were normal and that there was no digital clubbing.

In a subsequent report dated July 31, 2000, Dr. Subbiah concluded that appellant might have "mild pulmonary fibrosis bilaterally" and also he had pleural thickening with minimal calcification. The radiologist said that there was no definitive interstitial fibrosis but he did not mention that there was no interstitial fibrosis at all.

¹ Appellant retired December 30, 1989. The record contains a prior occupational disease claim filed by appellant on November 8, 1999.

By decision dated August 10, 2000, the Office modified the prior decision to accept the condition of mild pulmonary fibrosis asbestos related. The Office found that, since there was no pulmonary disability or impairment due to his accepted condition, no monetary compensation payments or schedule award was warranted.

In a November 30, 2000 letter, appellant requested reconsideration and submitted an October 6, 2000 report by Dr. Robert B. Altmeyer, a Board-certified internist, an October 6, 2000 x-ray interpretation and pulmonary function test.

Dr. Altmeyer diagnosed asbestosis based on “the finding of interstitial changes radiographically, persistent crackles on auscultation of the chest, a significant exposure to asbestosis and an appropriate latency period. At the present time he has no functional impairment from his asbestosis.”

In a February 20, 2001 report, the Office medical adviser reviewed the medical evidence and concluded that the pulmonary function tests revealed chronic obstructive pulmonary disease.

On February 21, 2001 the Office denied appellant’s request for reconsideration.

Appellant requested reconsideration by letter dated May 31, 2001 and enclosed a May 4, 2001 report by Dr. Harry K. Tweel, an attending physician specializing in pulmonary disease. Dr. Tweel stated that the “pulmonary function tests show a moderate obstructive ventilatory impairment with a significant response to bronchodilators” and a normal diffusion capacity. Diagnoses included interstitial pulmonary changes consistent with asbestosis, coronary artery disease, “brachial asthmatic component to the disease process possibly secondary or worsened by Atenolol,” chronic obstructive pulmonary disease, overweight and history of kidney stones.

In a September 5, 2001 report, the Office medical adviser reviewed the medical evidence and concluded that the pulmonary function tests showed effects of appellant’s asthma and chronic obstructive pulmonary disease. Regarding appellant’s asbestosis, the Office medical adviser stated that the FVC and DLCO were normal and thus there was no evidence supporting that appellant’s disability was causally related to his asbestosis.

By decision dated September 7, 2001, the Office denied modification of its prior decisions.

Appellant requested reconsideration by letter dated November 14, 2001 and enclosed a November 12, 2001 report by Dr. Tweel in support of his request.

In a November 12, 2001 report, Dr. Tweel concluded:

“His findings do show significant interstitial pulmonary change consistent with asbestosis. The patient also has coronary artery disease and an asthmatic component, as well as moderate chronic obstructive pulmonary disease as a component of his disease process. The combination of these problems undoubtedly contribute significantly to his dyspnea and respiratory distress.”

In a June 6, 2002 report, the Office medical adviser reviewed Dr. Tweel's report and noted that there was no opinion as to any impairment due to appellant's employment.

On June 13, 2002 the Office denied modification of the prior decision.

The Board finds that appellant is not entitled to a schedule award for a ratable impairment, causally related to his pulmonary disability due to his accepted work-related condition of asbestosis.

Section 8107 of Title 5 of the U.S. Code of Regulation provides that, if there is permanent impairment involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.²

The schedule award provisions of the Federal Employees' Compensation Act³ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.⁴ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁵

In the present case, the Office accepted appellant's occupational disease claim for mild pulmonary fibrosis -- asbestosis related, but found that appellant had no ratable pulmonary impairment. The relevant medical evidence includes reports by Drs. Altmeyer, Subbiah and Tweel and the Office medical adviser. Dr. Subbiah, in a July 21, 2000 report, reviewed his pulmonary function test results and concluded that the results were normal. In an October 6, 2000 report, Dr. Altmeyer opined that appellant had "no functional impairment from his asbestosis." The Office medical adviser reviewed the medical evidence including the diagnostic evidence and concluded that appellant had no ratable impairment due to his asbestosis in reports dated February 20, September 5 and June 6, 2000. Dr. Tweel noted that appellant's "pulmonary function tests show a moderate obstructive ventilatory impairment with a significant response to bronchodilators" with a normal diffusion capacity, but offered no opinion as to whether appellant had a ratable impairment due to his asbestosis. As none of the medical reports in record establish

² 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that he sustained a permanent impairment of a scheduled member or function as a result of his employment injury; *see Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

³ 5 U.S.C. § 8107 *et seq.*

⁴ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

⁵ *Marco A. Padilla*, 51 ECAB 202 (1999); *Arthur E. Anderson*, *supra* note 4 at 697.

that appellant has any impairment due to his accepted condition for mild pulmonary fibrosis -- asbestosis related, the Office properly denied his request for a schedule award.

The Board therefore finds that the Office medical adviser properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* in finding that appellant had no ratable pulmonary impairment. There is no other medical evidence, in conformance with the A.M.A., *Guides*, showing that appellant has a ratable pulmonary impairment. Appellant is therefore not entitled to a schedule award as he has no ratable pulmonary impairment.

As, however, appellant has the burden of proof to establish he has a ratable impairment, and as his accepted condition of pulmonary fibrosis -- asbestosis related -- entitles him to future pulmonary function testing and clinical and radiologic monitoring, any subsequently obtained evidence demonstrating a ratable degree of impairment due to his asbestosis, may be submitted to the Office with a request of reconsideration of his entitlement to a schedule award.

The decision of the Office of Workers' Compensation Programs dated June 13, 2002 is affirmed.

Dated, Washington, DC
January 15, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member